No. 15582

United States Court of Appeals

For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Oregon

ROY F. SHIELDS,
JOSEPH G. BERKSHIRE,
HOWARD E. ROOS,
727 Pittock Block,
Portland 5, Oregon,
Attorneys for Appellant.

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For the convenience of the Court, the following Reply to appellee's Brief is patterned generally according to the headings employed by appellee.

SPECIFICATION OF ERROR I

Motion for Summary Judgment
(Appellee's Br. p. 3)

Contrary to the statements made by appellee, this Specification excepts not only to the refusal to grant plaintiff's Motion for Summary Judgment, but also to the Findings and Conclusions of the Court with

respect to the classification of the frozen French fried potatoes. Although appellant offered no testimony, it conceded no facts other than those set forth in the Pre-Trial Order. The testimony offered by appellee did in fact go beyond mere amplification of the facts set out in the Pre-Trial Order. As pointed out at p. 33 of our opening Brief, it included expert testimony as to various factors of rate making and classification.

Cardinal Rules of Construction

(Appellee's Br. p. 4)

Appellee asserts the principle that where two tariff descriptions are equally appropriate, that which prescribes the lower rate, or that which is more specific should be deemed to apply. This principle is conceded, but while the decisions cited by the appellee recognize the existence of the principle, they do not illustrate its application. (These decisions are discussed briefly in Appendix A to this Brief.)

In every case the Court held that one of the classifications was more appropriate to the commodity in question. In every case the commodity might reasonably have been embraced within either of the two classifications involved. In five of the cases, the Court referred to decisions, rulings, or regulations of the Interstate Commerce Commission with respect to the commodity or practice involved.

Frozen French fried potatoes could not conceivably be both "vegetables, fresh or green" *and* "food, cooked, cured or preserved". The two tariff items accordingly are not "equally appropriate". Appellee asserts that the French fried potato "fits every word contained in the description under Item 4715". In at least eight instances (Appellee's Br. pp. 7, 8, 14) a comparison is made between French fried potatoes and "vegetables" or "potatoes" without reference to the words *"fresh* or *green"*. This is a serious oversight. Admittedly "vegetables" could be included in either Item 4715 or Item 4600, but only a *"fresh* or *green"* vegetable could be included under Item 4715. And conversely, while the general category of "food, cooked" might include the specific item of "vegetables", it could not include "vegetables, *fresh* or *green"*.

Comparison with Decisions Under the Fair Labor Standards Act
(Appellee's Br. p. 8)

Appellee asserts there is "close similarity" between the issue of classification in this case and those under the Fair Labor Standards Act. This is sought to be illustrated by three decisions under that Act. In *McComb vs. Hunt Foods,* 167 Fed. (2) 905, the Court held that the production of apple juice or pomace from peelings and cores received from dehydrating plants constituted "first processing" of fresh fruits.

In *Hendricks vs. DiGiorgio Fruit Co.,* 49 Fed. Supp. 573, the Court held that wine making from fresh grapes, including the distillation of brandy used to fortify the wine, was "first processing".

In *Mitchell vs. Oregon Frozen Foods Company,* 145 Fed. Supp. 157, appellee points out that the Government conceded French fried potatoes to be exempt under the "first processing" clause. The concession as stated on page 159 of the opinion reads:

> "The Government concedes that the *freezing* of potatoes by Ore-Ida Potato Co., is exempt under Section 207(b)(3)."

Said section was set forth on page 160 of the opinion, wherein it appears that the basis of that exemption is the seasonal nature of the industry, rather than the nature of the product. The Court noted at page 161 the Government's second contention (with respect to the claim for exemption under Section 213 (a)(10)), that *"blanching and freezing** the commodities changes them from their raw and natural state". The Court, however, denied exemption because the "area of production" requirements of the section had not been met, and said at page 161:

> "It is, therefore, not necessary to decide the second contention pertaining to the *blanching and freezing*."

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*All emphasis in quoted matter in this Brief is ours unless otherwise indicated.

It accordingly appears from the decision that the concession of the Government did not extend to the effect of the "blanching and freezing" process upon the potato in its raw and natural state.

We submit, however, that the extreme limits of "first processing" recognized under the Fair Labor Standards Act illustrate that no analogy exists between decisions under that Act and the issue before this Court. The quotation in the *Mitchell* decision at page 162 from the opinion of Judge James Alger Fee in *Walling vs. California Conserving Co., Inc.*, D.C., 74 F. Supp. 182, 183, emphasizes the purpose of the exemption to be related primarily to seasonal labor factors. For further reply to appellee, the Court is respectfully referred to pages 21 and 22 of our opening Brief.

Comparison with Decisions Under the Motor Carrier Act
(Appellee's Br. p. 11)

Substantial Identity
(Appellee's Br. p. 11)

The relevance of decisions under the Motor Carrier Act was discussed at pages 18 and 35 of our opening Brief. Appellee agrees that such decisions are relevant and cites three decisions under this Act at pages 11 to 14 of its Brief with respect to the "continuing substantial identity" test. None of these decisions, however, can afford solace to appellee, because the only vegetables mentioned therein are

"fresh vegetables for quick freezing"; "fresh cut up vegetables in cellophane bags"; "fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes"; and "vegetables (quick-frozen)". These decisions do not touch upon frozen French fried potatoes. The only decision dealing with this commodity is that of the Interstate Commerce Commission in *W. W. Hughes Extension—Frozen Foods,* M.C. 105783 Sub (3), dated April 16, 1957, which specifically holds that "frozen french fried potatoes" are *manufactured* products, and not exempt. We have previously noted in five cases discussed in Appendix A hereto, the consideration given by the Courts to decisions of the Interstate Commerce Commission on classification of commodities. By the same token, we believe that this decision is entitled to great weight, for it presages the views of the Commission on the prime issue in this case were it to be referred to that body.

Killing Enzymes
(Appellee's Br. p. 15)

Comparison of French Fries with Other Products of Appellee
(Appellee's Br. p. 15)

Definition of Words Under Tariff Item 4600 and 4715
(Appellee's Br. p. 16)

For response to appellee's version of the oil frying process and its purposes, we respectfully refer the

Court to the excerpts of testimony of Evan Gheen contained in Appendix A to our opening Brief.

Appellee contends that the frozen French fried potato has not changed its substantial identity from that of the potato in its "fresh or green" state. Emphasis is placed upon the inapplicability of the words in Item 4600 "cured" or "preserved". "Cooked" is construed to mean completely cooked. As discussed in our opening Brief, we believe such construction is not justified. Appellee on the other hand does not discuss the significance of the words "*fresh*" or "*green*" as contained in Item 4715, which it contends is applicable. Yet the connotation of these words, used in conjunction with each other clearly excludes a product such as the French fried potato, which even though not completely cooked, has nevertheless gone through a distinctive combination of processes of shaping, water blanching and frying in oil. Those processes, we submit, have changed its substantial identity from that of the raw "fresh or green" potato. We refrain from further repetitive argument and respectfully refer the Court to pages 11 through 16 of our opening Brief.

In the conclusion of appellee's Brief, the Court is requested to take "Judicial notice of the nature and use of the product". Its nature and use are clearly set forth in Exhibits 1, 2 and 3 which were offered as typical labels under which the product was shipped and marketed. The contents are described as

"Golden French Fried Potatoes" and depicted in their golden brown color. They are represented as having been "cooked in pure vegetable oil". It is stated that "After being fried in pure vegetable oil, they are immediately quick-frozen to seal in all the goodness and food values". While some instructions call for heating in an oven for 15 to 25 minutes, others indicate "10-15 minutes or until piping hot" to be sufficient. We repeat the commonly understood Webster definition of "French fried potatoes" quoted at page 15 of our opening Brief:

> "Potatoes cut into strips and *cooked* by frying in deep fat."

As we pointed out in our opening Brief (p. 32), such labeling constitutes "definite representations to the public at large, including the appellant". The significance of such representations is emphasized by a line of decisions of the Interstate Commerce Commission extending throughout the years from prior to 1910. In *J. B. Ford Company vs. Michigan Central Railroad Company et al,* (1910), 19 I.C.C. 507, the Commission quoted from the earlier decision of *Andrews Soap Co. vs. P. C. C. & St. L. Ry.,* 4 I.C.C. Rep., 41:

> "A manufacturer's description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates. Carriers are not required to analyze

> freight to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value."

In *Krause Plow Corp. v. Akron, C. & Y. R. Co.* (1952), 284 I.C.C. 65, the Commission said:

> "We have frequently found that the manufacturer's description of a commodity for sales purposes is to be given consideration in determining the proper classification and rates. See Norge Corp. v. Long Island R. Co., 220 I.C.C. 470, 474, and cases cited."

In *Chicago, B. & Q. R. Co. vs. California Wine Co.*, (1942), 40 N.E. 2d 624, the Appellate Court of Illinois said:

> "If a manufacturer finds it advantageous to describe his product in a manner calculated to give purchasers the impression that it is a different and higher-grade article than it actually is, he can not consistently complain if the carriers accept that description as a basis for the assessment of freight charges. Andrews Soap Co. v. Pittsburgh, C. & St. L. Ry. Co., 4 I.C.C. 41; Glidden Co. v. Akron, C. & Y. Ry. Co., 153 I.C.C. 684."

SPECIFICATION OF ERROR II

We believe that little reply is warranted to appellee's discussion of this Specification, and appellant will rely upon its opening Brief in this respect.

CONCLUSION

We respectfully submit that the judgment of the lower court should be reversed and judgment rendered for plaintiff-appellant.

Respectfully submitted,

ROY F. SHIELDS,

JOSEPH G. BERKSHIRE,

HOWARD E. ROOS,
727 Pittock Block,
Portland 5, Oregon,

Attorneys for Appellant.

APPENDIX A

United States vs. Strickland Transp. Co., Inc., 5 Cir., 200 Fed. (2) 234

The Court was concerned whether "Internal combustion engines" were to be classified as "Machinery or Machines or Parts Named—Engines, steam or internal combustion, N.O.I." or "Aircraft or parts named—Aircraft Parts N.O.I. other than cloth and metal or wood combined.", to which a higher rate applied.

The Court noted rulings of the Interstate Commerce Commission on the specific classifications involved (page 236—Note), and held that the first classification "more precisely describes and better fits the shipments in question".

Willingham vs. Seligman, 5 Cir. 179 Fed. (2) 257

The Court was asked whether shipments of shelled pecans tendered in quantity lots, but which moved in more than one truck on different days constituted single shipments entitled to a lower, quantity rate.

The Court noted an administrative ruling of the Interstate Commerce Commission on the subject (page 259) and held that the shipments were in fact single shipments.

U. S. vs. Gulf Refining Co.,
69 L. E. 1082; 268 U.S. 542

The question was whether a distillation of petroleum known as "casing head gasoline" was properly classified as "unrefined naphtha" or "gasoline", for which a higher rate was prescribed.

The Court gave careful consideration to the processing of the commodity and held the former to be the proper classification. The Court also referred to regulations of the Interstate Commerce Commission (page 550) relative to the handling of the product and to decisions of the Interstate Commerce Commission relative to the classification of petroleum products (page 548).

Buch Express vs. United States
132 Fed. Sup. 473

The Court was concerned whether shipments of "radar equipment" were "Electrical Appliances or Equipment" as "Radio Transmitting and Receiving Sets Combined" or "Drawing Instruments, Optical goods or Scientific Instruments", either as "Range or Height Finders", or as "Scientific Instruments, N.O.I.", which moved at a higher rate.

The Court held that "considering the underlying transportation characteristics involved", the first classification applied.

West Coast Products Corp. vs. Southern Pacific Co., 9 Cir. 226 Fed. (2) 830

The issue was whether shipments of olives cured with rock salt and then coated with olive oil were "Olives, salt cured, not preserved in liquid, in water proof barrels, boxes, kits or pails" or "Olives, canned or preserved in juice or in syrup, or in liquid other than alcoholic" which carried a higher rate.

The Court considered the processing of the commodity and concluded that the first-mentioned classification properly applied, and that no ambiguity existed in this respect.

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co. 133 Fed. Sup. 680

The issue concerned whether shipments of "sand" were "sand or gravel", or were "glass" or "silica" sand which took a higher rate. The Court in effect sat in review of a decision of the Interstate Commerce Commission which held that the higher rate applied. The Court concluded:

> "We are of the opinion that the Interstate Commerce Commission was correct in its construction of the tariff involved" (page 703).

Motor Cargo vs. United States 124 Fed. Sup. 370

The question was whether "gun controls" or "power drives" were to be classified "machinery or

machines N.O.I.", or "gun mount parts", or were "anti-aircraft directors", taking a higher rate.

The Court held that the latter was the proper classification, but that the carrier and the Government had actually contracted for the lower rate. The Court noted that the Interstate Commerce Commission had passed upon the classification of the commodity in question and had indicated that the higher rate applied (page 373).

Louisville & N. R. Co. vs. United States 109 Fed. Sup. 464

The issue was whether a "jeep" should be classified as a "freight" automobile, a "dumping or hauling" vehicle, or a "passenger" automobile, the last classification taking a higher rate.

The Court held that the last classification was proper, and that the higher rate should be charged.

Atchison Topeka & Santa Fe Ry. Co. vs. Simpson, 109 Fed. Sup. 616

The issue was whether certain carloads of wheat had been weighed "outbound" or had been weighed "en route", in which latter instance a higher charge would apply.

The Court held the lower charge to apply, since the shipper should not be penalized because the carrier had no track scales at the point of origin.